

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIS DANIEL SMITH, also known
as Daniel Smith, also known as Daniel
Votino; KARIS DELONG, also known
as Karis Copper; TAMMY OLSON;
and CHRIS OLSON,

Defendant.

CASE NO: CR-13-14- RMP-1

ORDER DENYING DEFENDANT
SMITH'S MOTION TO DISMISS
INDICTMENT FOR
PROSECUTORIAL MISCONDUCT
IN GRAND JURY PROCEEDINGS

BEFORE THE COURT is Defendant Louis Daniel Smith's "Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand Jury Proceedings," ECF No. 271. The motion was heard without oral argument. Defendant Smith is appearing *pro se* in this action. The Court has appointed Terrence M. Ryan as standby counsel for Mr. Smith. Christopher M. Parisi has appeared on behalf of

1 the Government. The Court has considered the motion and the file, and is fully
2 informed.

3 BACKGROUND

4 Defendant Smith was indicted on January 25, 2013, along with co-
5 defendants Karis Delong, Chris Olson, and Tammy Olson. Defendant Smith was
6 charged in the Indictment with one count of conspiracy in violation of 18 U.S.C. §
7 371; four counts of delivering misbranded drugs into interstate commerce in
8 violation of 21 U.S.C. §§ 331(a) and 333(a)(2); and one count of smuggling in
9 violation of 18 U.S.C. § 545. The indictment generally alleges that the Defendants
10 misbranded a solution of sodium chlorite and water and marketed it as a Miracle
11 Mineral Solution (“MMS”) for consumption to cure such ailments as malaria,
12 HIV/AIDS, hepatitis, and various forms of cancer. ECF No. 1.

13 In the instant motion, Defendant Smith alleges that the prosecution engaged
14 in misconduct before the grand jury in order to secure the Indictment against Smith
15 and his codefendants. Defendant Smith complains of a portion of Special Agent
16 Da Li Borden’s testimony before the grand jury on January 23, 2013, where the
17 Government’s attorney, Mr. Parisi, elicited testimony about how FDA
18 investigators came to be interested in the Defendant’s company, Project Greenlife.
19 The following colloquy occurred in response to Mr. Parisi’s question:
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1 A. [SPECIAL AGENT BORDEN] Project Greenlife was
2 originally flagged by FDA back in Washington, D.C. at our
3 headquarters level because of their claims on the internet regarding
4 using MMS for the H1N1 virus. The special section that reviews
internet websites started monitoring them and then started getting
reports of complaints of adverse events related to MMS, so we had
received several of those.

5 And then, approximately in 2010 there had been a complaint
6 that had come through the State Department regarding the death of a
7 U.S. citizen over in Vanuatu, which is a small island nation out in the
Pacific, that was related to MMS.

8 Q: [MR. PARISI] Now, based on your investigation do you have
any concrete, solid evidence that MMS caused that individual's death?

9 A: No. The autopsy was inconclusive, so we have not gone
10 forward with this investigation looking at MMS as a cause of that
death.

11 Q: I take it it was just a complaint that this individual had
12 consumed MMS and then had died, but there wasn't necessarily a
medical link between the two?

13 A: I think the medical link was not proved due to a variety of
14 circumstances, length of time till there was an autopsy, things like
this. His death occurred actually on a vessel out in the middle of the
15 Pacific, so by the time Australian authorities were able to conduct an
autopsy I think there was a lot of deterioration and they were unable
16 to provide a specific cause of death.

17 MR. PARISI: Members of the Grand Jury, I'll just give you a quick
18 caution there. We're offering that information just to explain why the
FDA got involved. We do not intend to present you any evidence that
19 there was a link between that, nor are we suggesting that you should
consider that when you consider the evidence that we are presenting.
It's just kind of some background for you.

20 ECF No. 271, Ex. B.

1 Defendant Smith additionally complains that Special Agent Borden was
2 asked a similar question regarding the background of the investigation during her
3 September 7, 2011, testimony before the grand jury, and that in that earlier grand
4 jury testimony Special Agent Borden did not offer information about a death off
5 the coast of Vanuatu allegedly connected to MMS. ECF No. 277, Ex. C.

6 The Government has indicated in a separate post-Indictment filing before
7 this Court that “[a]lthough there is evidence MMS manufactured by the defendants
8 was consumed by the deceased, the government has never alleged that the
9 defendants’ product or conduct caused the death.” The Government additionally
10 stated that the Vanuatu incident “has never formed any part of the proof the
11 government relies on in this case.” The Government thus initially chose not to
12 disclose evidence related to the State Department’s investigation into the Vanuatu
13 death in discovery because it considered such information to be “irrelevant and
14 inadmissible at trial.” ECF No. 277, Ex. A.¹

15 DISCUSSION

16 The basis of Defendant Smith’s motion to dismiss for prosecutorial
17 misconduct is that the testimony Mr. Parisi elicited from Special Agent Borden
18 regarding the Vanuatu death “was substantially hearsay non-expert ‘medical’
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20 ¹ The Government ultimately provided such discovery in response to a defense
motion. ECF No. 277, Ex. A.

1 opinion known by the government from the beginning to be irrelevant, highly
2 prejudicial, and entirely inadmissible at trial.” ECF No. 277 at 7. Defendant
3 Smith thus asks the Court to dismiss the Indictment pursuant to its inherent
4 supervisory powers.

5 Dismissal of an indictment is “considered a ‘drastic step’ and is generally
6 disfavored as a remedy.” *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir.
7 2000) (quoting *Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993)); *see also United*
8 *States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979) (“The Court’s power to
9 dismiss an indictment on the ground of prosecutorial misconduct is frequently
10 discussed but rarely invoked.”). An indictment may be dismissed pursuant to the
11 court’s supervisory powers “only in flagrant cases of prosecutorial misconduct.”
12 *United States v. De Rosa*, 783 F.2d 1401, 1406 (9th Cir. 1986).

13 Defendant Smith contends that the prosecutor engaged in flagrant
14 misconduct by presenting Special Agent Borden’s testimony regarding the
15 Vanuatu death to the grand jury on January 23, 2013. The Court does not agree
16 that flagrant misconduct occurred.

17 To the extent that the prosecutor simply asked Special Agent Borden to
18 explain to the jury why the FDA had become concerned about the sale of products
19 like the “Miracle Mineral Solution,” it was entirely proper for Special Agent
20 Borden to relate the FDA’s knowledge of suspected health issues related to those

1 problems. The Court notes that Mr. Parisi specifically elicited testimony
2 acknowledging that there was no direct link between MMS and the individual's
3 death, and Mr. Parisi additionally admonished the jury that the Government had
4 not introduced the evidence to suggest a link between MMS, Project GreenLife,
5 and the Vanuatu death. ECF No. 271, Ex. B.

6 The facts of the Government's conduct here thus stand in stark contrast to
7 the conduct at issue in the case upon which the Defendant primarily relies: *United*
8 *States v. Samango*, 607 F.2d 877 (9th Cir. 1979). In *Samango*, the prosecutor gave
9 the grand jury lengthy and misleading transcripts of testimony from previous grand
10 juries without warning them of a key witness's "doubtful credibility." In addition,
11 the prosecutor engaged in what the Ninth Circuit described as "an impressive
12 repertory of insults and insinuations" during the defendant's testimony for no other
13 purpose than "calculated prejudice." Moreover, the grand jury was given a short
14 decision deadline which discouraged a thorough and independent evaluation of the
15 evidence. *Id.* at 881-83. The Ninth Circuit found in *Samango* that "[t]he
16 cumulative effect of the above errors and indiscretions, none of which alone might
17 have been enough to tip the scales, operated to the defendants' prejudice by
18 producing a biased grand jury." *Id.* at 884; *see also De Rosa*, 783 F.3d at 1406
19 (finding no flagrant misconduct where the prosecutor committed isolated errors
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1 that may have led the grand jury to believe the defendant faked a disability despite
2 an undisclosed acquittal on a related charge).

3 In this case, any misconduct that may have occurred was isolated and at least
4 partially corrected by testimony that the prosecutor took care to elicit.² Such facts
5 are far removed from the showing of “flagrant misconduct” necessary to warrant
6 dismissal of the Indictment under the Court’s supervisory powers. In addition,
7 even if flagrant misconduct could be established, the Defendant has not shown that
8 he was prejudiced by the complained-of testimony.

9 An indictment may not be dismissed for prosecutorial misconduct without a
10 showing of prejudice to the defendant. *Bank of Nova Scotia v. United States*, 487
11 U.S. 250, 255 (1988). Thus, dismissal of the indictment is appropriate only where
12 “it is established that the violation substantially influenced the grand jury’s
13 decision to indict” or where “there is ‘grave doubt’ that the decision to indict was
14 free from the substantial influence of such violations.” *Id.* at 256 (quoting *United*
15 *States v. Mechanik*, 475 U.S. 66, 78 (1986) (O’Connor, J., concurring)). Here,
16 Defendant Smith relies on the “grave doubt” theory for establishing prejudice.

17 ² Defendant Smith further argues that the prosecutor committed misconduct by
18 presenting perjured testimony. However, Special Agent Borden testified that
19 investigators merely suspected a link between MMS and the Vanuatu death, and
20 that there was no conclusive evidence actually establishing such a link. Defendant
Smith has not shown that it was perjury to testify that investigators considered a
possible but unproven link.

1 It is clear from the Indictment that a great deal of evidence was presented to
2 the grand jury regarding the Defendants, Project GreenLife, and the Defendants'
3 alleged actions of selling a misbranded drug, "Miracle Mineral Solution." ECF
4 No. 1. The Vanuatu incident itself is not mentioned in the Indictment despite a
5 lengthy recitation of other allegations on which the Indictment was based. *Id.*
6 Moreover, the Defendants were not charged with any crime of causing actual harm
7 to persons, but rather for conspiring to and actually distributing into interstate
8 commerce a misbranded drug. *Id.*

9 In addition, the prosecutor admonished the grand jury following Special
10 Agent Borden's testimony that the information was offered only "to explain why
11 the FDA got involved" in investigating MMS as a criminal matter and that the
12 Government did not intend to suggest "a link" between MMS, Project GreenLife,
13 and the Vanuatu death. ECF No. 271, Ex. B. Such warnings "undoubtedly tended
14 to neutralize the effect" of Special Agent Borden's testimony regarding the
15 Vanuatu death. *See United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392
16 (9th Cir. 1983); *see also De Rosa*, 783 F.2d at 1405 (nothing that it "would be
17 difficult to find that one [improper] statement, when counterbalanced with the
18 prosecutor's admonition, had significantly undermined the grand jury's ability to
19 make an objective evaluation").

1 Because Defendant Smith has not established flagrant misconduct or
2 prejudice, it would be improper to dismiss the indictment under the Court's
3 supervisory powers based upon Special Agent Borden's testimony before the grand
4 jury.

5 Accordingly, **IT IS HEREBY ORDERED** that Defendant Louis Daniel
6 Smith's "Motion to Dismiss Indictment for Prosecutorial Misconduct in Grand
7 Jury Proceedings," **ECF No. 271**, is **DENIED**.

8 The District Court Clerk is directed to enter this Order and to provide copies
9 to counsel and *pro se* Defendant Louis Daniel Smith.

10 **DATED** this 29th day of April 2014.

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13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 Chief United States District Court Judge
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